

EXHIBIT 1

1 Services and Media Lab, all in their official and individual capacities, and John
2 Does 1-50. (Amended Complaint (“FAC”) at ¶ 1.) [Doc. No. 19.] AVP is an
3 educational video producer and AIME is a national trade association whose
4 mission is to help ensure copyright education and compliance. (*Id.* at ¶ 2.)

5 Plaintiffs allege that Defendants used DVDs that are licensed by AVP and
6 other AIME members (“AVP DVDs”) and that Defendants unlawfully copied,
7 reformatted the DVDs, and put the content of the DVDs on the internet. (*Id.* at ¶
8 3.) Plaintiffs allege that UCLA, at the direction of and/or supervision of
9 Defendants Farb, Loehrer, and O’Donnell copied an AVP program “The Plays of
10 Williams Shakespeare” and put it on the UCLA internet network so that students
11 and faculty could view the DVD’s content from remote locations at anytime (a
12 practice commonly referred to as “streaming”). (*Id.* at ¶ 6.) AVP alleges that a
13 viewer of the DVDs does not have to be in an educational setting because the
14 person can view the content as long as that person has access to the UCLA
15 network (such as a student overseas). (*Id.* at ¶ 46.)

16 In 2009, AVP, through AIME, contacted UCLA through its Chancellor,
17 objecting to this use of the AVP DVDs. (*Id.* at ¶¶ 7-8.) UCLA, after initially
18 desisting the practice, informed AVP that it believed it had the right to copy the
19 AVP DVDs and put the content on the UCLA internet under the Licensing
20 Agreements UCLA had entered into with AVP. (*Id.* at ¶ 10.)

21 An Amended Complaint (“FAC”) was filed on February 14, 2011. [Doc.
22 No. 19.] The FAC asserts federal claims for copyright infringement and unlawful
23 circumvention (“DMCA”), a declaratory relief claim, and state claims for breach
24 of contract, anticipatory breach of contract, breach of implied covenant of good
25 faith and fair dealing, unjust enrichment, tortious interference with contractual
26 relations, and tortious interference with prospective business advantage. (FAC at
27 ¶¶ 32-44.) Defendants filed this Motion on March 14, 2011, arguing that: (1) they
28 are immune from suit; (2) Plaintiff AIME lacks standing; and (3) Plaintiffs have

1 failed to state a claim upon which relief can be granted.

2 STANDARD OF LAW

3 I. Rule 12(b)(1)

4 Federal courts are courts of limited jurisdiction. *Kokoonen v. Guardian Life*
5 *Ins. Co.*, 511 U.S. 375, 377 (1994). A plaintiff bears the burden to establish that
6 subject matter jurisdiction exists. *Id.* A “court of the United States may not grant
7 relief absent a constitutional or valid statutory grant of jurisdiction.” *U.S. v.*
8 *Bravo–Diaz*, 312 F.3d 995, 997 (9th Cir. 2002). Federal Rule of Civil Procedure
9 12(b)(1) authorizes a motion to dismiss for lack of subject matter jurisdiction.

10 A motion to dismiss for lack of subject matter jurisdiction under Rule
11 12(b)(1) can be either a facial or factual attack. *See Wolfe v. Strankman*, 392 F.3d
12 358, 362 (9th Cir. 2004). In a facial attack on subject matter jurisdiction, the court
13 is confined to the allegations in the complaint. In a factual attack, the court is
14 permitted to look beyond the complaint and may consider extrinsic evidence. *See*
15 *id.* (citing *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1036 (9th Cir. 2004)),
16 *Savage v. Glendale Union High Sch.*, 434 F.3d 1036, 1040 n. 2 (9th Cir. 2003).
17 Jurisdiction must generally be determined prior to a federal court considering a
18 case on its merits. *See United States v. Larson*, 302 F.3d 1016, 1019 (9th Cir.
19 2002) (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94, 118 S.Ct.
20 1003, 140 L.Ed.2d 210 (1998)).

21 II. Rule 12(b)(6)

22 Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a
23 complaint for “failure to state a claim upon which relief can be granted.”
24 Dismissal of a complaint can be based on either a lack of a cognizable legal theory
25 or the absence of sufficient facts alleged under a cognizable legal theory.
26 *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). On a
27 motion to dismiss for failure to state a claim, the court accepts as true all well-
28 pleaded allegations of material fact, and construes them in light most favorable to

1 non-moving party. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025,
2 1031-32 (9th Cir. 2008). To survive a motion to dismiss, the complaint “must
3 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
4 plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1938 (2009) (quoting *Bell*
5 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A formulaic recitation of
6 the elements of a cause of action will not suffice. *Twombly*, 550 U.S. at 555
7 (citations omitted).

8 DISCUSSION

9 I. Sovereign Immunity

10 Defendants first argue that the Eleventh Amendments bars the instant suit
11 against the Regents and the individual defendants in their official capacity because
12 the state has not consented to be sued and Congress has not validly overridden the
13 state’s immunity. (Memorandum in Support of Motion to Dismiss (“Defs’
14 Memo”) at 5-9.) Plaintiffs sued various state officials and the Regents, which is
15 an “arm of the state” for purposes of the Eleventh Amendment. *See Jackson v.*
16 *Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982).

17 In order for a state to be validly sued in federal court, the state must have
18 either expressly waived sovereign immunity or Congress must have validly
19 abrogated sovereign immunity. A waiver can be found when a state makes a
20 “clear declaration” that it intends to submit itself to federal court jurisdiction.
21 *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S.
22 666, 675-76 (1999). An agreement to obey federal law is not tantamount to a
23 waiver of sovereign immunity. *Fla. Dept. of Health & rehab. Servs. V. Fla.*
24 *Nursing Home Ass’n*, 450 U.S. 147, 150 (1981) (per curiam). Congress can
25 abrogate state sovereign immunity when it does so pursuant to its enforcement
26 powers under Section 5 of the Fourteenth Amendment. *Seminole Tribe of Florida*
27 *v. Florida*, 517 U.S. 44, 72-73 (1996).

28 Plaintiffs argue that California waived immunity in its 2008-2011 contract

1 with AVP. (Opposition to Motion to Dismiss (“Plts’ Opp”) at 3-4.) That contract
2 states that “Licensee hereby consents to the jurisdiction of the state and federal
3 courts located in New York, New York.” (FAC ¶ 14, Exhibit 7.) Defendants
4 counter that: (1) the DVDs at issue in this case were sold in 2006, before that
5 agreement came into effect; (2) the agreement only waives contractual claims, not
6 the claims asserted under copyright infringement and DMCA; and (3) AIME is not
7 a party to that contract, therefore the contract does not allow AIME to sue the
8 state. (Reply to Motion to Dismiss (“Defs’ Reply”) at 2-3.) A review of the
9 agreement indicates that Defendants waived only claims by AVP arising out of the
10 2008-2011 agreement.

11 Defendants correctly argue that any attempt by Congress to abrogate
12 immunity as to claims brought under the Copyright Act is invalid because the Act
13 does not stem from Congress’s enforcement powers under the 14th Amendment.
14 *See Holley v. Cal. Dep’t of Corr.*, 599 F.3d 1108, 1111 (9th Cir. 2010). Plaintiffs
15 argue that the Court need not decide this issue because Defendants’ actions
16 amount to an actual violation of the due process clause which, by itself, abrogates
17 immunity. (Plts’ Opp at 4-5.) Specifically, Plaintiffs argue that Defendants’
18 assertion of sovereign immunity, coupled with its assertion that the state law
19 claims are preempted, constitutes a due process violation that waives sovereign
20 immunity because it precludes them from presenting their claims before any
21 judicial forum. (*Id.*). However, as Defendants point out, Plaintiffs are not
22 precluded from asserting their claim for injunctive relief or their claim for
23 damages against the Defendants in their individual capacity.

24 The Court finds that the Regents and the officers are immune from the
25 copyright and DMCA claims. First, the agreement between AVP and the UCLA
26 does not expressly waive sovereign immunity as to federal copyright claims.
27 Second, Plaintiffs do not dispute Defendants’ contention that Congress failed to
28 validly abrogate sovereign immunity. Lastly, Plaintiffs’ argument that an actual

1 violation of due process has occurred is unavailing, as Plaintiffs could assert a
2 claim against the officers in their individual capacity. Thus, Plaintiffs are not
3 being denied all access to a remedy for their alleged violations of copyright law.

4 II. Standing

5 a. Associational Standing

6 Federal courts' jurisdiction is limited by the U.S. Constitution to "cases"
7 and "controversies" that are justiciable, which requires that a plaintiff have
8 "standing" to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).
9 Typically, standing requires that a plaintiff have suffered an injury in fact; that
10 there be a causal connection between the injury and the conduct complained of;
11 and that it be likely that the injury will be redressed by a favorable decision. *Id.*
12 An association may assert standing when: (1) its members would have standing to
13 sue on their own, (2) the interests it seeks to protect are germane to the
14 organization's purpose, and (3) the case does not require the participation of
15 individual members in the lawsuit. *See Hunt v. Washington State Apple*
16 *Advertising Commission*, 432 U.S. 333, 343 (1977).

17 Defendants argue that AIME does not state any factual allegations to
18 support the first requirement of associational standing. They further argue that, as
19 a matter of law, a copy right case requires the participation of individual members
20 and therefore AIME cannot meet the third requirement of associational standing.
21 (Defs' Memo at 15-17.) Defendants specifically argue that for AIME's members
22 to have standing, they would have to own the necessary copyrights to the works at
23 issue, which AIME has failed to allege, and this necessarily means that the
24 individual members would have to be involved in the lawsuit. AIME counters that
25 since it only seeks declaratory relief, there is no need for individualized inquiries
26 that require individual participation. AIME also argues that the Complaint alleges
27 that AVP, which is a member of AIME, has standing to sue on its own right
28 because it owns the rights to the copyrighted works at issue. (Plts' Opp at 11;

1 FAC at ¶5.) AIME's other members are also alleged to hold copyrights, although
2 not the ones at issue here. (FAC at ¶¶15-16.)

3 In order to establish a claim for copyright infringement, individual
4 copyrights owners' participation is necessary. This is because having the rights
5 over a copyright is essential to establishing a copyright infringement claim.
6 *Marder v. Lopez*, 450 F.3d 445, 453 (9th Cir. 2006); 17 U.S.C. § 106. Plaintiff
7 AIME argues that because it only seeks declaratory relief, no individualized
8 participation by members is necessary. However, the scope of that declaratory
9 relief would be limited by the rights that members have over the copyrights.
10 Therefore, Plaintiff AIME, as a matter of law, has failed to establish associational
11 standing because it cannot meet the third prong of the test under *Hunt*.

12 b. Injury in Fact

13 Defendants argue that AIME also lacks standing to sue on its own because
14 it lacks any injury in fact. (Defs' Memo at 17-18.) The FAC alleges that AIME
15 has "suffered from the diversion of its resources to deal with the Defendants'
16 infringement of [the] copyright works." (FAC at ¶ 16.) Defendants argue that
17 these diversion of resources are nothing more than litigation costs, which do not
18 constitute an injury in fact for purposes of standing. *See Spann v. Colonial*
19 *Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990).

20 Plaintiff AIME argues that it has suffered more than litigation expenses, and
21 points to the section in the Complaint that alleges that AIME has had to divert its
22 limited resources. (Plts' Opp at 13:16-23; FAC at ¶ 16.) However, AIME does
23 not allege which activities have been diverted as a result of UCLA's use of the
24 DVDs at issue. AIME only alleges a conclusory statement that its resources have
25 been diverted, but, without more, this is insufficient to confer standing under the
26 applicable case law. Based on these allegations, the Court finds that AIME lacks
27 standing to bring this suit on its own.

28 III. *Failure to State a Claim*

1 a. Defendants Yudof and Block

2 Defendants Yudof and Block argue that Plaintiffs' claims against them must
3 be dismissed because the Complaint lacks allegations that Yudof and Block "have
4 some connection with the enforcement of the [allegedly unlawful] act." *See Ex*
5 *parte Young*, 209 U.S. 123, 157 (1908). Sovereign immunity bars claims against
6 individuals in their official capacity unless the claim seeks prospective injunctive
7 relief and there is a causal connection between the officer and the alleged violation
8 of federal law. *Pennington Seed, Inc. v. Produce Exchange No. 229*, 457 F.3d
9 1334, 1342 (9th Cir. 2006). (Defs' Memo at 9-11.) The FAC alleges that
10 Defendant Yudof enforces University of California policies, including upholding
11 copyright law. (FAC at ¶¶ 18-19.) However, there is no allegation that a
12 particular policy enforced by Yudof violates the law. Similarly, the FAC alleges
13 that Defendant Block instructed his legal counsel and other UCLA staff to
14 correspond with AVP and AIME (*id.* at ¶ 24), but it does not contain any
15 allegations that the correspondence constituted copyright infringement. The Court
16 therefore finds that Plaintiff AVP has failed to state a claim not barred by
17 sovereign immunity against Defendants Yudof and Block.

18 b. Copyright Infringement

19 The remaining Defendants argue that Plaintiffs insufficiently pled their
20 copyright infringement claim. AVP alleges that Defendants' use of the DVDs
21 (streaming them on the UCLA intranet) infringed on multiple exclusive rights that
22 AVP has over the DVDs. (FAC at ¶¶ 44-45.) These exclusive rights included the
23 rights to control copying, public performance, public display, and public
24 distribution. (*Id.*) Defendants argue that AVP (or "Ambrose") does not state a
25 claim for violation of AVP's exclusive rights to publicly perform, publicly
26 display, distribute, and copy under the Copyright Act because: (1) AVP granted
27 Defendants the right to publicly perform the DVDs at issue; (2) UCLA's
28

1 streaming practice is not a “public display” under the Copyright Act;¹ (3) there
2 are no allegations that UCLA distributed copies of the DVD, as “streaming” is not
3 distribution, and (4) any unauthorized copying was an incidental “fair use” under
4 the Copyright Act and therefore permissible. (Defs’ Memo at 18-20.)

5 AVP argues that Defendants’ copying the DVD in a way that changes the
6 format of the DVD to a digital format for use on the internet violates AVP’s rights
7 under the copyright law. (Plts’ Opp at 14-15.) As to Defendants’ fair use
8 argument regarding the making of unauthorized copies, Plaintiffs argue that
9 Defendants’ use is not fair use because Defendants knew that their license was
10 limited and did not provide for streaming (and therefore incidental uses of the
11 streaming practice such as copying) of the DVDs.

12 *(1) Publicly Perform*

13 AVP concedes that it licensed Defendants to “publicly perform” the DVD.
14 (FAC, Exhibit 8.) At oral argument, AVP conceded that within the scope of the
15 right to publicly perform the DVD is Defendants’ ability to show the DVD in a
16 classroom. Plaintiff’s basic argument is that streaming is not included in a public
17 performance because it can be accessed outside of a classroom, and as remotely as
18 overseas. However, Plaintiff does not dispute that in order to access the DVDs, a
19 person must have access to the UCLA network and specifically to the DVD. The
20 type of access that students and/or faculty may have, whether overseas or at a
21 coffee shop, does not take the viewing of the DVD out of the educational context.
22 The Court finds that the licensing agreement allows Defendants to put the DVD
23 content on the UCLA internet network as part of the provision of the agreement
24 that Defendants could “publicly perform” the DVD content, and therefore
25 Plaintiffs have failed to state a claim of copyright infringement over their right to
26 publicly perform the DVD.

27 _____
28 ¹ Specifically, Defendants argue that “public display” is the “showing of individual images nonsequentially,” and the Complaint does not allege any nonsequential display.

1 (2) “*Public Display*” and “*Distribution*”

2 Plaintiffs do not specifically counter Defendants’ arguments that
3 “streaming” is not distribution or that the Complaint lacks allegations of “public
4 display.” The Court finds that Plaintiffs have failed to state a claim for a violation
5 of these rights under copyright law.

6 (3) “*Copying*”

7 Defendants do not dispute that they did not obtain authorization from AVP
8 before placing the DVDs’ content on the UCLA network. They argue that the
9 copying was an incidental use of their right to publicly perform the DVDs.
10 Incidental exercises of other lawful rights constitute non-infringing “fair use.” *See*
11 *perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (holding that
12 the creation of short-term copy to be a fair use). Here, Plaintiff AVP alleges that
13 Defendants copied the DVD in order to be able to put it on the UCLA internet
14 network. Because placing the DVD on the UCLA network is part of the right that
15 Plaintiff licensed to Defendants, the copying was incidental fair use.

16 c. DMCA

17 Defendants argue that the Complaint fails to properly allege a claim under
18 the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 1201. (Defs’
19 Memo at 20-21.) Defendants argue that the allegations in Plaintiffs’ Complaint do
20 not give rise to a violation under §1201 because the allegations pertain to
21 Defendants’ “use” of the DVDs, not the “access” of the DVDs, and § 1201 only
22 forbids unlawful “access” to the DVDs. In support, they cite Nimmer on
23 Copyright § 12A.03[D][3], which states that “a person who engages in prohibited
24 usage of a copyrighted work to which he has lawful access does not fall afoul of
25 any provision of Section 1201.” AVP counters that its DMCA claim arises out of
26 the anti-trafficking provision, 17 U.S.C. § 1201(a)(2), which is not limited to a
27 defendant’s “access” to the work. In reply, Defendants argue that “using” a
28 protected work is not the same as “trafficking” for purposes of the DMCA. (Defs’

1 Reply at 15.)

2 Section 1201(a)(2) provides that “[n]o personal shall manufacture, import,
3 offer to the public, provide, or otherwise traffic in any technology . . . is primarily
4 designed or produced for the purpose of circumventing a technological measure
5 that effectively controls access to a work protected under this title.” 17 U.S.C. §
6 1201(a)(2)(A). The FAC alleges that Defendants used a company called Video
7 Furnace in order to bypass a copy prevention system established by AVP in its
8 DVDs. (FAC at ¶¶ 60-62.) More specifically, the FAC alleges that Defendants
9 worked with Video Furnace to make circumvention applications available for
10 higher education. (*Id.* at 60.) However, the FAC does not allege how the
11 Defendants worked with Video Furnace, or what actions Defendants took that
12 constitute the “manufacture, import, offer to the public, prov[ision], or otherwise
13 traffic[king]” of the DVDs. The conclusory allegations in the FAC are, by
14 themselves, insufficient to establish a violation of the anti-trafficking provision of
15 the DMCA. *See Johnson v. Lucent Technologies, Inc.*, No. 09-55203, --- F.3d ---,
16 2011 WL 3332368, *8 (9th Cir. 2011) (“Conclusory allegations and unwarranted
17 inferences [] are insufficient to defeat a motion to dismiss.”).

18 d. State Law Claims

19 Defendants argue that AVP’s state law claims are preempted by the
20 Copyright Act or otherwise barred under California’s discretionary function
21 exemption.² (Defs’ Memo at 21-24.) Plaintiffs’ state law claims are: (1) unjust
22 enrichment; (2) tortious interference; (3) breach of implied covenant of good faith
23 and fair dealing; (4) breach of contract; and (5) anticipatory breach of contract.

24 The Copyright Act preempts claims that “are equivalent to any of the
25 exclusive rights within the general scope of copyright.” 17 U.S.C. § 301(a);
26 *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1089 (9th Cir. 2005). A state-

27 ² Cal. Gov’t Code § 820.2 provides that public employees are not liable for injuries resulting from acts that were the
28 “result of the exercise of the discretion vested in” the public employee. Plaintiffs argue that discretionary immunity
is inappropriate to be addressed at this early stage. (Plts’ Opp at 21 n.33.)

1 law claim is preempted if: (1) the work involved falls within the general subject
2 matter of the Copyright Act, and (2) the rights asserted under the state law are
3 equivalent to those protected by the Act. *Zito v. Steeplechase Films, Inc.*, 267 F.
4 Supp. 2d 1022, 1027 (N.D. Cal. 2003).

5 A claim for unjust enrichment arising from alleged unauthorized use of a
6 copyrighted work, where there is no extra element to the claim, is generally
7 preempted. *Zito*, 267 F. Supp. at 1027. Claims for tortious interference are also
8 generally preempted when they involve acts of unauthorized use of copy righted
9 work, even though they require proof of additional elements. *See Oldcastle*
10 *Precast, Inc. v. Granite Precasting & Concrete, Inc.*, No. C10-322, 2010 WL
11 2217910 (W.D. Wash. June 1, 2010). This is because the additional element does
12 not “make the rights qualitatively different.” *Id.* The preemption analysis for a
13 claim for breach of contract depends on whether “the right in question is infringed
14 by the mere act of reproduction, performance, distribution or display.” *Selby v.*
15 *New Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1061 (S.D. Cal. 2000) (quotation
16 marks and citation omitted).

17 Plaintiffs concede that they cannot assert a breach of contract claim purely
18 based on Defendants’ streaming practice, as that would be preempted by the
19 Copyright Act. Plaintiffs instead argue that certain contractual provisions are
20 cognizable under state law because the rights infringed are qualitatively different
21 than the rights protected by the Copyright Act. (Plts’ Opp at 23-24.) The
22 provisions cited by Plaintiffs are: (1) the guarantee that each program be exhibited
23 “only in its entirety” with “complete copyright notices and credits”; (2) the
24 promise in the 2008-2011 License that UCLA would pay “a higher price for
25 streaming rights”; and (3) the 2008-2011 License’s covenant “prohibiting use of
26 Plaintiff AVP’s trademarks.” According to Plaintiffs, this means that the breach of
27 contract claims, the unjust enrichment claim, and the claim for breach of implied
28 covenant of good faith and fair dealing. However, it appears that Plaintiffs

1 concede that they cannot assert a breach of contract claim purely based on
2 Defendants' streaming practice, as that would be preempted by the Copyright Act.
3 (Plts' Opp at 5 n.9; Defs' Reply at 17:14-16.) A review of the FAC indicates that
4 it lacks the factual allegations to establish the basis for the breach of the three
5 provisions that AVP claims are not preempted by the Copyright Act. All the
6 factual allegations relate to AVP's purported copyright infringement claim, and
7 therefore the corresponding state law claims are preempted.

8 **CONCLUSION**

9 For the reasons stated above, Defendants' Motion to Dismiss is
10 GRANTED, and (1) all claims against the Regents and any claims seeking
11 damages against individual defendants in their official capacity are dismissed with
12 prejudice; (2) the declaratory relief claim asserted by AIME is dismissed without
13 prejudice for lack of sufficient allegations to support standing; (3) all claims for
14 injunctive relief against Defendants Yudof and Block are dismissed without
15 prejudice for failure to state a claim; (4) Plaintiffs' federal copyright infringement
16 claim and DMCA claim are dismissed without prejudice for failure to state a
17 claim; (5) and Plaintiff's state law claims are dismissed without prejudice for
18 failure to state a claim that is not preempted by the Copyright Act. If Plaintiffs
19 decide to file an amended complaint, such amended complaint must be filed no
20 later than October 17, 2011.

21 **IT IS SO ORDERED.**

22
23
24 DATED: October 03, 2011_____

By 

25 _____
26 CONSUELO B. MARSHALL
27 UNITED STATES DISTRICT JUDGE
28